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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

REACE TESHAWN FOSTER,

Defendant and Appellant.

E054279

(Super.Ct.No. RIF10004371)

OPINION

APPEAL from the Superior Court of Riverside County. J. Richard Couzens, Judge. (Retired judge of the Placer Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

# I

## INTRODUCTION

On January 18, 2011, an information charged defendant and appellant Reace Teshawn Foster with second degree robbery of Miguel Hernandez under Penal Code<sup>1</sup> section 211 (count 1); and with second degree robbery of Carlos Gomez under section 211 (count 2). As to both counts, the information also alleged that defendant personally used a firearm under section 12022.53, subdivision (b). The information further alleged that defendant: (1) suffered a prior conviction of robbery, served a term in state prison for said offense, did not remain free of prison custody and did commit an offense resulting in a felony conviction during a period of five years, within the meaning of section 667.5, subdivision (b); (2) suffered a second prior conviction of receiving stolen property, served a term in state prison for said offense, did not remain free of prison custody and did commit an offense resulting in a felony conviction during a period of five years, within the meaning of section 667.5, subdivision (b); and (3) suffered a prior offense for robbery, a serious felony, within the meaning of sections 667, subdivisions (c) and (e)(1) and 1170.12, subdivision (c)(1).

Defendant pled not guilty and denied the allegations. Defendant was advised of and waived his right to a jury or court trial on the priors, and admitted them. On June 10,

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

2011, a jury returned a verdict of guilty on each count, and found the firearm allegation true as to each count.

On August 12, 2010, defendant's motions for a new trial and to strike the strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 were denied. Defendant was sentenced to a total state prison term of 22 years, as follows: (1) count 1—midterm of three years, doubled to six years for the strike prior, plus 10 years for the firearm enhancement; and (2) count 2—the midterm of three years, doubled to six years for the strike prior, plus 10 years for the firearm enhancement, concurrent; (3) one year for one prison prior, consecutive; and (4) five years for one prior serious felony, consecutive.

On August 12, 2011, defendant filed his notice of appeal.

## II

### STATEMENT OF FACTS

#### A. Prosecution Case

In September of 2010, defendant and Adela Jaimes leased unit 16 at Olivewood Apartments in Riverside. The apartment managers, Maria and Carlos Melendez, lived next door in unit 17. Each tenant was assigned one parking space, numbered corresponding to the apartment number. A parking sticker was issued to each apartment. Each vehicle was required to have a sticker in order to park at the building, and the managers kept a log of the vehicles authorized to park in each parking space. Defendant and Jaimes registered a black Crown Victoria to their apartment. The Olivewood

Apartments had a contract with General Towing Company, which was located about five miles away from the apartment building, to check once every 24 hours for unauthorized vehicles.

Around 3:15 a.m. on October 2, 2010, General Towing towed a silver Saturn vehicle, which was parked in space 16 with no parking sticker, from the Olivewood Apartments. The tow truck driver got authorization to tow the vehicle after calling Mrs. Melendez and receiving her permission. At 3:17 a.m., a public safety dispatcher with the City of Riverside logged in that a silver Saturn owned by Edgar Aragon had been towed from the Olivewood Apartments to the tow yard.

About 9:30 a.m. on October 2, General Towing's owner, Miguel Hernandez, received an angry phone call from a female asking if a silver or gray Saturn had been towed there from the Olivewood Apartments. Hernandez verified that he had the vehicle and told the woman when she could pick it up.

Hernandez and his employee, Carlos Gomez, arrived at the tow yard at around 10:00 a.m. The tow yard was surrounded by a fence with a locked gate. People were waiting outside. Hernandez and Gomez started to help the first customers to retrieve their cars. After collecting one \$340 cash impound fee and paperwork from a few customers, they walked a short distance to the office, located in a small trailer, to process the release paperwork. They locked the gate behind them. While they were processing the paperwork, Gomez and Hernandez heard a female screaming that the tow yard was a crooked operation and they wanted their money back. They then saw an African-

American male jump the tow yard gate. Hernandez exited the trailer, approached the male subject, and told him he was going to call the police. The subject pulled a silver handgun from his shorts, pointed it at Hernandez's head, and told him to go back inside the office. After returning to the trailer, the subject waved the gun, pointed it at the faces of Hernandez and Gomez, and demanded his paperwork and the keys to the gate. Gomez saw that the gun was loaded.

In the small trailer, Hernandez and Gomez clearly saw the male subject's face. The man did not have anything covering his face or head. Gomez described him as having short hair, less than one-inch long, age 20 to 30, built like a linebacker, about 215 to 230 pounds, and about six feet two to four inches tall. The man was wearing a white tank top and blue shorts. Gomez could not recall seeing any tattoos.

The subject took Hernandez's cell phone from him, punched or pushed him in the chest, and knocked him down. Again, he demanded his paperwork and the keys to the gate. The subject told Hernandez to open the gate or he would kill Hernandez. Gomez and Hernandez told the subject the paperwork was on the desk. The subject took the paperwork, cash, and another cell phone from the desk. Gomez said he would open the gate. Gomez and Hernandez walked out to the gate at gunpoint; Gomez opened the gate. The subject tried to hand his gun to a male customer; the customer looked scared and refused to take the gun. Gomez went to the back of the lot and called 911. The subject got into a silver Saturn and drove it off the lot without permission. As he pulled out of the lot, he stopped and a Hispanic female got into the passenger seat.

Meanwhile, back at the Olivewood Apartments, Adela Jaimes knocked on the managers' door, angrily asking where her car was, saying it had been towed; she demanded the car's return. About 11:55 a.m., a male tenant from unit 15 came to the managers' door with a cell phone; Jaimes was on the line. She apologized for her earlier behavior and said that they found the car. She asked Mr. Melendez to not call the police because her car had been found.

The next day, October 3, 2010, police conducted a follow-up investigation with the information on the Saturn vehicle and the Olivewood Apartments address. The police determined that defendant and Adela Jaimes lived in unit 16. Two identical six-pack photographic lineups, which included defendant's photograph, were created and shown separately to Hernandez and Gomez. Both men positively identified defendant as the gunman who took the money and paperwork from the office and left the tow yard in a car without paying its impound fee.

Police monitoring the apartment complex observed defendant driving away from the location in a tan Lexus at 11:35 p.m. on October 3. Jaimes and defendant's father, Reace Foster, Sr. (Foster Sr.), were passengers in the vehicle. Foster Sr. was an older African-American with "messy" hair, partly in cornrows or dreadlocks, and partly unbraided and nappy, hanging free in disarray. Aside from their hair, defendant and his father were similar in appearance and stature.

Hernandez and Gomez were transported to a field show-up where defendant, Foster Sr., and Jaimes were separately displayed to them from some distance away. Both

Gomez and Hernandez eliminated Foster Sr. as the suspect based on his hair. Moreover, they could not identify Jaimes as the female who left with the gunman from the tow yard. Also, neither witness could see defendant clearly, and neither positively identified him as the gunman. Hernandez, however, stated that he was about 80 percent sure that defendant was the gunman. Defendant had his shirt off at one point during the field show-up, and the officer conducting the show-up observed that defendant had visible tattoos on his arm and chest. Neither Hernandez nor Gomez mentioned that the suspect had tattoos. At trial, both Gomez and Hernandez positively identified defendant as the gunman.

Edgar Aragon bought the silver Saturn from the Salvation Army on August 10, 2010. The car had mechanical problems. Aragon's mother, Amalia Valdovinos, worked as a caregiver for defendant's grandfather, Ernest Foster. He lived in Perris, California, with Foster Sr. On a Friday in October of 2010, Valdovinos drove the Saturn to Ernest Foster's home in Perris and left the car there for the weekend because of mechanical problems. She left the keys in Perris with Ernest Foster. Valdovinos retrieved the Saturn the following Monday or Tuesday. About two weeks later, Valdovinos decided to get the car fixed in Mexico to save money. She and her son drove another car down to Mexico to find a mechanic. Valdovinos arranged to pay Foster Sr. to drive the Saturn down to Mexico. Foster Sr. drove to the border and stayed at a motel in Calexico with Aragon, while Valdovinos went to Mexico to locate a mechanic. On October 14, 2010, Aragon and Foster Sr. were arrested in Calexico because they were in possession of a car that had been reported as stolen. Aragon was investigated and released. Prior to the arrest,

Valdovinos was unaware that the Saturn had previously been towed. She never drove it to the Olivewood Apartments.

#### B. Defense Case

The defense tried to establish that defendant was not the gunman at the tow yard, and that he was not at the tow yard at the time of the incident.

Celinda Perez, a close friend of defendant's, visited defendant, Jaimes, and their two children at their apartment in the evening on October 1, 2010. Perez testified that she arrived there about 7:00 p.m. Jaimes testified that Perez was there most of the day. Perez drove her car and parked it in Jaimes and defendant's assigned parking space 16, as was her habit, and used their parking sticker.

Family and friends, including Perez, provided transportation for defendant and Jaimes once or twice a week, and also allowed them the use of their vehicles. Neither defendant nor Jaimes owned a vehicle. They let their friends use their parking sticker so they would not be towed.

When Perez arrived at the apartment on the evening of October 1, 2010, she told defendant and Jaimes that she would be leaving that night, but would return the next morning to take defendant and Jaimes to Perris to celebrate Foster Sr.'s birthday. Perez left about midnight. Defendant and Jaimes were asleep and did not know that Perez had left.

Perez returned to defendant's apartment the following morning, October 2, and drove defendant, Jaimes and their children to Perris for the birthday festivities. They



arrived in Perris around 9:45 a.m. and stayed there for three or four hours. The grandfather was also there.

After a few hours at Foster Sr.'s home, Perez drove defendant, Jaimes, the children, and Foster Sr. to the home of defendant's mother, Barbara Walker, because of an emergency involving Walker. They dropped defendant off at Walker's house about 4:00 p.m. An hour later, they returned and picked defendant up. They all returned to defendant's apartment in Riverside.

Adela Jaimes testified that she went to the apartment manager to ask about a towed vehicle early in the morning on October 2 because she had overheard a conversation at the apartment complex about a vehicle being towed. She asked about it because she did not see Perez's car, and Perez did not tell her Perez was going to leave the night before. Jaimes believed the towed vehicle may have belonged to Perez. Jaimes claimed that she did not go to the managers' door. Instead, she saw Mr. Melendez outside. She was very calm when speaking to him. Since Perez returned to the apartment complex around 8:30 a.m., this conversation had to take place prior to then. Jaimes did not have any further communication with the apartment managers about the towed vehicle.

Antonio Elliott witnessed the events at the tow yard on the morning of October 2. Elliot went with his brother, Anthony Bush, to General Towing's tow yard that morning to pick up Bush's towed car. They arrived at 9:00 a.m. and were the first of about 10 to 15 people who lined up at the gate.

Two men arrived to open up the tow yard. Bush handed over his money to collect his car, and one of them took Bush's money and went back behind the gate. A red car pulled up. There were four or five people in the car, mostly females. A male from the car came up to the gate, told one of the waiting customers to shut up and not say anything, and jumped over the locked gate. The man was wearing a doo-rag on his head and a hooded sweatshirt. Other than his eyes, his whole face and head were covered. The man was six feet three or four inches tall, thick or overweight, and had dark skin. Elliott, however, could not tell the man's race.

Elliott returned to his car to wait for Bush. He heard a lot of commotion and went back to the gate. One of the tow yard employees returned to the gate and opened it for the man who had jumped the gate. Either the employee or the male subject, who was holding a gun, told the waiting customers to get their cars. Both men came through the gate. The gunman told Elliot to take the gun and tried to give it to him. Elliott "tried to play it off like I wasn't even there," avoided making eye contact with the gunman, and turned away. He did not take the gun. The customers went inside the tow yard to get their cars.

Since Bush already paid for the car, he went inside the tow yard and retrieved it. Bush and Elliott left the scene. Two hours later, they both returned to the tow yard to complete the release paperwork. There, they were detained and questioned. Elliott told the police that the man who jumped the fence wore a doo-rag and hood that covered his face.

### C. Prosecution Rebuttal Witness

Riverside Police Officer Alfonso Navar was present at the tow yard investigating the incident when Bush and Elliott returned. Elliott gave a statement describing the incident. Elliott stated that a male subject and a female walked up to the tow yard gate. They were “heated” about their car being towed. He described the subject as a big African-American male. As to other details, Elliott stated that he was not paying attention and did not want to be involved. He did not describe the subject’s height or mention that he was wearing a doo-rag or a hoodie.

### D. Motion for New Trial

Defendant moved for a new trial on grounds of newly discovered evidence and witness intimidation by Foster Sr. The motion was supported by defendant’s undated handwritten statement, which was not executed under penalty of perjury; trial counsel’s affidavit under penalty of perjury; and an unsigned, undated memorandum written by defense investigator Christy Threadgold.

Defendant’s statement’s stated that a woman named Amalia,<sup>2</sup> her husband, and son were involved in transporting immigrants using a Saturn vehicle. They were trying to recruit defendant and Foster Sr. to assist them. After Foster Sr. and defendant drove the Saturn to Calexico and back, Foster Sr. parked the Saturn in defendant’s assigned parking space. Defendant reminded him to display the parking sticker on the car, but Foster Sr.

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<sup>2</sup> Amalia Valdovinos was Ernest Foster’s caregiver and the mother of Edgar Aragon, the owner of the silver Saturn.

forgot. The next morning, the car was gone. Foster Sr. was angry, banged on the managers' door, and Jaimes asked about the car. Defendant's female neighbor called the tow yard and made an appointment to pick up the car. Amalia and two other females arrived at defendant's apartment in a maroon Lexus. They picked up Foster Sr. and followed the neighbor to the tow yard. An hour and a half later, Foster Sr. called defendant saying that he had picked up the car and was returning to Perris on some important business.

About two hours later, Foster Sr. called defendant again, asking him to call Perez to pick up Foster Sr. in Perris. Perez drove defendant to Perris where they picked up Foster Sr. and eventually returned to defendant's apartment. Foster Sr. told defendant and Jaimes "what really happen[ed]." When defendant, Jaimes and Foster Sr. were stopped by the police later, while in the vehicle of Corey Flowers, Foster Sr. told them, "don't say shit he's a second striker [and] he gonna do life behind bars." After defendant was arrested, Foster Sr. threatened to kill Jaimes and her children if she said anything. Jaimes, Amalia, and Ernest Foster were all afraid of Foster Sr. Defendant did not say anything for the safety of his family. Defendant wrote that he was willing to testify against his father if his family was protected.

The sworn affidavit of defendant's trial counsel stated that counsel "was made aware" that defendant and Jaimes had received written, oral and/or telephonic threats by Foster Sr. dissuading them from giving true and complete testimony at trial. Defense

investigator Threadgold spoke with Jaimes to get a statement, but she was reluctant to sign an affidavit and did not want to testify; she was fearful of Foster Sr.

Defense investigator Threadgold's memo stated that she interviewed Jaimes on July 29, 2011, and Jaimes stated that she lied at trial when questioned whether she knew Amalia Valdovinos for fear that Foster Sr. would believe she was trying to implicate him. Jaimes knew that Foster Sr. committed the charged offenses. On the day of the incident, Foster Sr. knew that the Saturn had been towed, he was given a ride to retrieve it from the tow yard, and he called Jaimes that day and stated that he had retrieved the car. After defendant's arrest, Foster Sr. repeatedly threatened the safety of Jaimes and her children if she notified the authorities of Foster Sr.'s involvement.

The People opposed defendant's motion for new trial on the grounds that (1) the information was not "newly discovered" but was known and obtainable at the time of trial; (2) objectively considered, the "new" evidence would not probably lead to a different result; and (3) defendant was not denied due process or a fair trial.

No witnesses were called at the hearing on the motion for new trial. After reading and considering the written motion and opposition, and hearing oral argument, the trial court denied the motion on the grounds that the evidence was not newly discovered and was not likely to lead to a different result upon retrial.

### III

#### ANALYSIS

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In his four-page supplemental brief, defendant contends that he received ineffective assistance of counsel (IAC). Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

We hereby address defendant's IAC claim. In order to establish a claim of IAC, a defendant must demonstrate, "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.) Hence, an IAC claim has two components: deficient performance and prejudice. (*Strickland v. Washington, supra*, at

pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) If the defendant fails to establish either component, his claim fails.

In this case, defendant contends that his appellate counsel rendered IAC because “appellate counsel submitted before the Appellate Court a Wende Brief without describing the appeal as frivolous.” Defendant goes on to state that “appellate counsel’s failure to raise arguable issues in the record in appellate’s [*sic*] brief creates a presumption of prejudice.” Defendant’s argument is without merit because under the mandate of *People v. Kelly, supra*, we have to independently review the record for potential error. Simply filing a brief under the authority of *People v. Wende, supra*, does not deem a counsel’s performance as ineffective.

We have now concluded our independent review of the record and found no arguable issues.

IV

DISPOSITION

The judgment is affirmed.

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MCKINSTER  
J.

We concur:

RAMIREZ  
P.J.

RICHLI  
J.